

**U.S. Department of Labor**

Office of Administrative Law Judges  
800 K Street, NW, Suite 400-N  
Washington, DC 20001-8002

(202) 693-7300  
(202) 693-7365 (FAX)



**Issue Date: 06 October 2004**

***In the Matter of:***

ENOS M. COLE, (widow of FRED COLE,  
deceased),  
Claimant,

CASE NO: 2003 BLA 95

v.

DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS,  
Party-in-Interest.

***Appearances:***

Jim D. Cole, Lay Representative  
For the Claimant

Marla J. Haley, Esquire  
For the Director

Before: EDWARD TERHUNE MILLER  
Administrative Law Judge

**DECISION AND ORDER—DENYING BENEFITS**

Statement of the Case

This proceeding involves a request for modification of a survivor's claim for benefits under the Black Lung Benefits Act as amended, 30 U.S.C. §§ 901 *et seq.* (Act), and the regulations promulgated thereunder. Since this claim was filed after March 31, 1980, Part 718 applies. 20 C.F.R. § 718.2. Because the deceased miner was last employed as a coal miner in Illinois, this claim is governed by the law of the United States Court of Appeals for the Seventh Circuit. *Shupe v. Director*, 12 BLR 1-202 (1989) (en banc).

Issues

1. Whether there was a mistake in the determination of fact in the previous Decision and Order denying Claimant benefits on June 30, 2000 or elsewhere in the record.

2. If so, whether pneumoconiosis was a substantially contributing cause or factor leading to Cole's death.

### Procedural History

The miner, Fred Cole, Jr. (Cole), filed a claim for benefits under the Act on August 20, 1985. (D-20). By Decision and Order dated July 8, 1988, Administrative Law Judge (ALJ), Stuart Levin, awarded Cole benefits. (D-20). Cole died on October 4, 1996. (D-4).

Claimant, Enos Marie Cole, filed a survivor's claim for benefits under the Act on October 18, 1996. (D-1). The district director denied the claim by letter dated February 28, 1997. (D-7). Claimant appealed, and after submission of additional evidence, the director again denied the claim. (D-9). Claimant appealed the subsequent denial. (D-11). Following an informal conference on July 9, 1997, the director recommended that the claim be denied. The case was transferred to the Office of Administrative Law Judges on October 10, 1997. (D-21). On September 23, 1998, Judge Gerald M. Tierney issued a Decision and Order denying Claimant benefits. (D-24). Claimant filed a request for modification on January 11, 1999 and requested a formal hearing, which was held in St. Louis, Missouri on June 30, 2000. After the hearing, Judge Robert L. Hillyard denied the claim. (D-35). The Benefits Review Board (Board) affirmed Judge Hillyard's opinion. *Cole v. Director*, BRB No. 00-1041 BLA (July 30, 2001). On September 13, 2001, Claimant filed another request for modification. Claimant requested a formal hearing before an ALJ, which was held in St. Louis, Missouri on June 20, 2003. Because of the date of Cole's employment, no responsible operator has been named in this claim. 20 C.F.R. § 725.1(c).

### Background

Cole married Claimant on August 31, 1947. (D-3). They were married until Cole's death on October 4, 1996. (D-1). Claimant was financially dependent on Cole throughout their marriage. *Id.* The record supports a finding that Cole worked underground as a coal miner for four-and-a-half years as a general laborer. Cole last worked in the coal mine industry in 1948, before the Occupational Safety and Health Administration (OSHA) and the Mine Safety and Health Administration (MSHA) enacted regulations to limit coal dust exposure. (D-1). Because of these regulations and subsequent efforts to improve coal miners' working conditions, the degree of coal dust exposure is less severe today than when Cole worked as a miner. (CX-1 & 8). By all accounts, Cole's exposure to coal mine dust was intense. (CX-7). Subsequent to coal mining, Cole worked for fifteen years in a magnesium foundry, pouring hot metal and as a furnace tender. (D-2; TR-21). At the foundry, Cole was exposed to occupational silica, coal combustion gases, soot, and at least minimal levels of asbestos. (TR-24; CX-7).

Cole had a smoking history of approximately forty pack-years. The record contains numerous and wide-ranging references to his smoking history. Judge Hillyard relied on reports by Drs. Cander, Popovic, and Kurichtey to find a seventy-five pack year history of smoking. Claimant contends, and this tribunal agrees, that the finding is too high. Dr. Sudholt, who examined Cole, noted a forty pack year history. Dr. Cander, subsequent to Judge Hillyard's decision, amended his finding of Cole's smoking history from seventy-five to forty pack-years.

Dr. Britton also found a forty-pack year history. Further, Claimant submitted testimonial evidence from friends and coworkers of Cole that Cole smoked less than a pack of cigarettes a day during the twenty-year period that he worked in the coal mine and at the foundry. In reliance on Drs. Britton, Sudholt, and Cander, and considering Claimant's testimonial evidence, this tribunal finds a smoking history of forty pack-years.

### Medical Evidence

Medical evidence relied on by Judge Hillyard is incorporated herein by reference. New medical evidence and evidence directly related to Cole's cause of death is summarized below.

#### *Death Certificate*

Dr. Birchler signed the original death certificate on October 17, 1996. (D-4). Dr. Birchler listed the cause of death as "carcinoma of the lung with metatasis [sic]." *Id.* He listed essential vascular hypertension as a significant condition contributing to, but not resulting in, the underlying cause of death. *Id.* Dr. Birchler later filed a corrected death certificate. (D-35). The corrected certificate lists the immediate cause of death as "carcinoma with metatasis [sic]" and lists coal miner's pneumoconiosis and essential vascular hypertension as other significant conditions contributing, but not resulting in, the underlying cause of death. *Id.* In a letter to the Department of Labor, Dr. Birchler explained that he amended the original certificate based on information he received from Dr. Pflasterer regarding Cole's condition and Cole's 1988 award of black lung benefits. *Id.*

#### *Dr. Long*

Dr. Long issued a brief statement on September 23, 1997 based on her review of the medical evidence of record and the extensive medical literature submitted by Claimant. She opined that the medical literature did not clearly link coal worker's pneumoconiosis with carcinoma of the lung and that Cole's smoking history was the most likely cause of Cole's lung cancer. (D-16).

#### *Dr. Pflasterer*

Dr. Pflasterer treated Cole from January 6, 1972 until his death on October 4, 1996. (D-14). The evidence of record from Dr. Pflasterer includes three letters submitted on Cole's behalf. The first letter, dated December 9, 1996, states that Cole suffered from pneumoconiosis and that his death was due to carcinoma of the lung with hepatic and osseous metastasis. (D-6). In the second letter, dated May 30, 1997, Dr. Pflasterer speculated: "I feel that his pneumoconiosis was a likely contributing facto [sic] to his demise." *Id.* Dr. Pflasterer wrote a third letter on October 15, 1997 stating that, from the time Cole was first under Dr. Pflasterer's care, Cole progressively developed emphysema and fibrosis. (D-22). The only other evidence from Dr. Pflasterer was a medical report written by Dr. Pflasterer in 1978, which confirms that Dr. Pflasterer had long since found evidence of mild emphysema with minimal non-specific fibrosis. (D-6). Dr. Pflasterer further opined in his third letter that because of its additional adverse effect on his pulmonary function status, Cole's "chronic lung condition" contributed to and hurried Cole's

death from carcinoma of the lung. (D-22). Dr. Pflasterer did not identify any objective evidence to support his finding of Cole's "chronic lung condition" or that condition's role in Cole's death.

*Dr. Cander*

Dr. Cander, a board-certified internist but not a board-certified pulmonary specialist, issued two medical reports. His initial review on March 5, 1998 was based on specified medical records, including three x-rays, pulmonary function tests and arterial blood gas studies dated November 21, 1995, and Cole's death certificate. (D-23). Dr. Cander found that Cole worked in a coal mine for four-and-three-quarters years, worked in a foundry for fifteen years, and had a smoking history of seventy-five pack years. *Id.* Dr. Cander recognized that Cole was previously determined by Judge Levin to have a disabling chronic obstructive lung disease caused partially by inhalation of coal dust. (D-20). He noted, however, that the pulmonary function tests and blood gas studies performed less than one year before Cole's death yielded nonqualifying results under Federal disability standards. (D-23). Dr. Cander opined that Cole's mild obstruction did not contribute to or hasten Cole's death from lung cancer. *Id.* Dr. Cander concluded that Cole's lung cancer was caused by smoking and by asbestos exposure that occurred outside of Cole's coal mine employment. *Id.*

Dr. Cander prepared a second report on June 22, 2003. (D-48). The new report relied on the previously reviewed evidence, an additional chest x-ray reading dated September 4, 1985, and a medical report by Dr. Britton. In his second report, Dr. Cander amended his previous finding of Cole's smoking history without explanation from seventy-five pack years to "at least forty." He noted that Cole was exposed to asbestos outside of his coal mining employment and that the combination of cigarette smoking and asbestos at least contributed to Cole's lung cancer. After reviewing pulmonary function tests and arterial blood gas studies from 1995, Dr. Cander found that there was no causal relationship between chronic hypoxemia and the pneumoconiosis capable of inducing cor pulmonale, heart failure or cardiac rhythm disturbance. Dr. Cander stated that Cole's death was entirely the result of metastatic lung cancer. Dr. Cander noted that there was no proof of interstitial fibrosis or silicosis. Dr. Cander also stated his belief that silica is not a proven lung carcinogen. *Id.*

*Dr. Britton*

Dr. Britton, who is board-certified in occupational medicine and an A-reader, prepared a medical report on May 21, 2003, based on his review of specified medical records and reports. (C-7). Dr. Britton found a smoking history of forty pack years. He also noted that Cole worked in coal mines for approximately four-and-three-quarters years and in a foundry for fifteen years—with silica and coal dust exposure at both work sites, and possible asbestos exposure at the foundry. Dr. Britton concluded that Cole died of lung cancer "which resulted from the synergistic activity of cigarette smoking, the effects of coal dust, silica, coal combustion gases, and asbestos." Dr. Britton noted that exposure to coal dust, silica, and asbestos are known occupational hazards that can cause pulmonary impairments. *Id.*

Dr. Britton criticized the nonqualifying pulmonary function tests taken in 1995 and referred to by Dr. Cander because they did not specify all the relevant data required under

§ 718.10(b). (CX-7). In particular, the tests did not include three tracings of each test, did not note the type of spirometer used, and did not record Cole's ability to understand directions. *Id.* He also found that the studies were invalid because the breath holding time in the study exceeded ten seconds, "which in all probability, invalidates the diffusion capacity study." *Id.* Other criticisms of the diffusion capacity study included the lack of more than one diffusion test, the lack of predicted normals of the diffusion capacity, an IVC of less than 90% of the FVC, and a failure to give copies of all test attempts. *Id.*

#### *Other Medical Evidence*

Claimant submitted copious medical literature as evidence attempting to establish a link between silica exposure, silicosis, and lung cancer. Most relevant are the National Toxicology Program Report on Carcinogens, United States Department of Health and Human Services, and publications of the National Institute for Occupational Safety and Health (NIOSH) both of which classified crystalline silica as a known human carcinogen. (CX-5,11,12). Dr. Goldsmith, an epidemiologist, reviewed medical evidence and the relevant medical studies, and opined that silica exposure and smoking act synergistically to enhance the risk of developing lung cancer. An Illinois State Geological Survey (ISGS) included with Claimant's evidence states that the in-seam quartz (silica) content of the coal where Cole worked was up to 5.5%.

### Conclusions of Law and Discussion

#### Modification

A party to a black lung claim may request modification within one year of the date of the last payment of benefits or within one year of the denial of the claim. 20 C.F.R. § 725.310(a). Upon the showing of a "change in conditions" or a "mistake in a determination of fact" the terms of an award or the decision to deny benefits may be reconsidered on the merits. *Id.*<sup>1</sup> In a survivor's claim, the sole ground for modification is a mistake in a determination of fact—as the deceased coal miner's condition is no longer susceptible to meaningful change. An ALJ should review all evidence of record to determine if there has been a mistake in a determination of fact. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971); *Jessee v. Director, OWCP*, 5 F.3d 723 (4th Circuit 1993); *Director, OWCP v. Drummond Coal Company (Cornelius)*, 831 F.2d 240 (11th Circuit 1987). As discussed above, Judge Hillyard found that Cole had a smoking history of seventy-five pack years. This tribunal concluded that the record demonstrates a smoking history of forty pack years. This disparity constitutes a mistake of fact necessitating that this tribunal reconsider Claimant's claim.

#### Survivor's Claim

The Black Lung regulations provide benefits to eligible survivors of a miner whose death was due to pneumoconiosis. 20 C.F.R. § 718.205(a). Claimant must prove that: (1) Cole had pneumoconiosis; (2) Cole's pneumoconiosis arose, at least in part, out of his coal mine

---

<sup>1</sup> The regulations of the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. § 922, are incorporated into the Black Lung Benefits Act by 33 U.S.C. § 932(a), and provide statutory authority to modify orders and awards.

employment; and (3) Cole's death was due to pneumoconiosis. *Id.* The parties have stipulated that Cole had pneumoconiosis and that his pneumoconiosis arose from his coal mine employment. Thus, the only issue in contention is whether Cole's death was due to pneumoconiosis.

Because Cole's claim was filed after January 1, 1982, his death will be considered due to pneumoconiosis if any of the following criteria are met: (1) competent medical evidence establishes that pneumoconiosis caused Cole's death; (2) pneumoconiosis was a substantially contributing cause or factor leading to Cole's death, or where death was caused by complications of pneumoconiosis; or (3) where the presumption in § 718.304 applies. 20 C.F.R. § 718.205(c). The record does not contain evidence of complicated pneumoconiosis, so the presumption in § 718.304 does not apply. Claimant has not submitted autopsy evidence.

Claimant has not proved by competent medical evidence that pneumoconiosis caused Cole's death. The parties agree that Cole's death was caused directly by carcinoma of the lungs, not pneumoconiosis. Claimant must prove that pneumoconiosis was a substantially contributing cause leading to Cole's death. Claimant has not done so.

"Pneumoconiosis is a 'substantially contributing cause' of a miner's death if it hastens the miner's death." 20 C.F.R. § 718.205(c)(5). The burden is on Claimant to establish that pneumoconiosis substantially contributed to Cole's death. 20 C.F.R. § 718.205(a). The medical evidence of record suggests two alternate theories by which pneumoconiosis may have hastened Cole's death. The first theory is that pneumoconiosis lowered Cole's overall functional state and hastened Cole's death by rendering him less able to combat the lung cancer that ultimately killed him. Claimant argues, second, that Cole's coal mine employment exposed Cole to heavy coal dust that contained silica, that silica is a known human carcinogen, and that the silica, at least in part, caused Cole's lung cancer thereby hastening his death.

#### Cole's Reduced Functional State

Claimant has not proved that the presence of pneumoconiosis lowered Cole's overall functional state thereby hastening Cole's death. Cole's treating physician, Dr. Pflasterer, and the physician signing Cole's death certificate both opined that pneumoconiosis was a factor in Cole's death. Neither opinion, however, is supported by objective medical evidence.

Cole's original death certificate did not mention pneumoconiosis. (D-4). The certificate listed Cole's cause of death as "carcinoma of the lung with metatasis [sic]." *Id.* Dr. Birchler amended Cole's death certificate to add "coal miner's pneumoconiosis" as another significant condition "contributing, but not resulting in, the underlying cause of death." (D-35). Dr. Birchler amended the initial death certificate after Dr. Pflasterer informed him that Cole had pneumoconiosis and that Cole had received lifetime benefits for pneumoconiosis. *Id.* Dr. Birchler did not state any additional basis for his amended conclusion. There is no evidence in the record that Dr. Birchler was familiar with Cole's condition, smoking history, employment history, or medical data. Furthermore, Dr. Birchler's credentials are not of record. Because there is no objective evidence supporting Dr. Birchler's "correction," this tribunal finds that it is unreasoned, undocumented, and entitled to little weight. *See Smith v. Camco Mining, Inc.*, 13

B.L.R. 1-17 (1989) (finding that ALJ erred by accepting conclusions in a death certificate when the record did not indicate that the individual signing the certificate had the qualifications and the personal knowledge necessary to assess the cause of death).

Dr. Pflasterer's decision is likewise entitled to little weight. Dr. Pflasterer's first letter states that Cole suffered from pneumoconiosis and his death was due to carcinoma of the lung. His second letter adds, without explanation, that Cole's pneumoconiosis was a likely contributor to Cole's death. In his final letter, Dr. Pflasterer said that from the time Cole was first under his care, Cole progressively developed emphysema and fibrosis. He opined that because of its additional adverse effect on his pulmonary function status, Cole's chronic lung condition contributed to and hurried Cole's death from carcinoma of the lung. Dr. Pflasterer did not specify the nature of the "chronic lung condition" to which he referred. He did not provide any objective evidence to support his opinion and he did not address Cole's smoking history or additional employment as possible alternate causes of Cole's pulmonary impairment.

By contrast, Dr. Cander found that:

[P]ulmonary function tests and an ABG obtained less than one year before his [Cole's] death did not meet [sic] disability standards. Thus the mild degree of bronchial obstruction noted could not possibly [sic] have caused, contributed to or hastened his death from metastatic lung cancer. All of the information in the record indicates that Mr. Fred Coal [sic] died on October 4, 1996 from metastatic lung cancer.

(D-23). Unlike Dr. Pflasterer, Dr. Cander relies on objective medical evidence—evidence that he expressly opined does not show a pulmonary impairment sufficient to hasten Cole's death.<sup>2</sup> Furthermore, there is no medical evidence of record that links Cole's mild pulmonary impairment to his four-and-a-half years of coal mining employment as opposed to his forty pack years of smoking or fifteen years of work in a foundry.

Dr. Pflasterer's status as Cole's treating physician does not entitle his opinion to controlling weight. An ALJ must have a medical reason for preferring one physician's conclusion over that of another. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 834 (6th Cir. 2002) ("[T]reating physicians should not automatically be presumed to be correct."); *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 469-70 (7th Cir. 2001) (an ALJ need not defer to the opinion of a treating physician that is insufficiently documented or reasoned). Although Dr. Pflasterer treated Cole for more than twenty years, the nature and frequency of that treatment is not established in significant detail and, as noted above, the letters written by Dr. Pflasterer are neither well-supported nor adequately reasoned. Dr. Pflasterer's opinions suffer from the critical flaws of failing to connect Cole's impairment to his coal mine employment and failing to show how Cole's impairment actually hastened his death from lung cancer. Dr. Pflasterer's opinion is

---

<sup>2</sup> Claimant argues that Dr. Cander's opinion is invalid because Dr. Cander relied on nonconforming pulmonary function tests and arterial blood gas studies in reaching his decision. The Board, however, has held that the quality standards under part 718 are not mandatory and "an otherwise reliable and probative study must not be rejected simply for failing to satisfy a noncritical quality standard." *Gorman v. Hawk Contracting, Inc.*, 9 BLR 1-76 (1986).

insufficient to satisfy Claimant's burden of persuasion with regard to any substantial connection between his pneumoconiosis and causal factors leading to Cole's death.

### Lung Cancer Caused by Coal Dust Exposure

Claimant argues that Cole's coal mine employment caused the lung cancer that ultimately lead to Cole's death. The argument postulates that Cole was exposed to coal dust containing silica, silica is a known carcinogen, and Cole's exposure to the coal dust containing silica was at least a partial cause of Cole's lung cancer. Thus, according to Claimant, Cole's death was hastened by pneumoconiosis because it was a crucial component of the etiology of Cole's fatal lung cancer. Claimant has marshaled impressive quantities of evidence to show that Cole in fact breathed coal dust containing silica and that exposure to silica in fact causes lung cancer. Where the tall stack of research and epidemiological studies falls short, however, is that they do not establish that *Cole's* exposure to silica caused the lung cancer that lead to his death.

### *Causal Link between Silica and Cancer*

Claimant has submitted several hundred pages of evidence to establish a causal link between silica and cancer. The evidence of record does suggest such a link. Several prominent organizations and numerous studies have recognized silica as a carcinogen. Most notably, the National Toxicology Program Report on Carcinogens, United States Department of Health and Human Services, and NIOSH have all classified crystalline silica as a known human carcinogen. (CX-5,11,12). Further, studies of record have demonstrated that silica exposure and smoking have a synergistic effect in raising the risk of lung cancer. (D-13).

Dr. Goldsmith, an epidemiologist, surveyed the relevant studies and concluded, based on his reading of the studies, that silica exposure in smokers acts synergistically to enhance the risk of developing lung cancer. (CX-1). Dr. Britton also concluded, based on his experience and his review of Claimant's medical research, that silica is a carcinogen. In contrast, Dr. Cander argued that the link between silica exposure and lung cancer has not been confirmed:

The IARC [International Agency for Research on Cancer] indicates that there is limited human evidence for the association between silica and cancer. Several epidemiologic studies of silica exposure and lung cancer have suffered from noncomparability of reference groups, possible detection bias, and possible confounding from other carcinogenic risk factors such as cigarette smoking and radon exposure.

(D-48). Dr. Britton criticized Dr. Cander for failing to consider the numerous studies that found a causal link between silica exposure and lung cancer and for failing to consider the synergistic association between smoking, silica exposure, and the development of lung cancer. (CX-7).

In his June 2000 Decision and Order, Judge Hillyard was unpersuaded by Claimant's medical literature. Judge Hillyard wrote:

I find that this evidence [Claimant's research studies] is entitled to no probative weight. Although the weighing of the evidence is for the Administrative Law Judge, the



interpretation of medical data is for the experts. Accordingly, it is error for an Administrative Law Judge to interpret medical tests and thereby substitute an adjudicator's conclusions for those of a physician.

(D-35) (citations omitted). This tribunal agrees with Judge Hillyard but recognizes that Judge Hillyard did not have the benefit of Dr. Britton's opinion. Dr. Britton is a medical expert who considered the medical data and concluded that a causal link exists between silica exposure and lung cancer. Dr. Britton's conclusion is supported by volumes of evidence of record and by the opinion of the epidemiologist, Dr. Goldsmith. Dr. Cander's opinion is more skeptical than Dr. Britton's, but it is not a denial of the link between silica exposure and lung cancer. The IARC study Dr. Cander relies on does not deny the causal link between silica and lung cancer—it merely notes that there is “limited human evidence for the association between silica and cancer.” Further, Dr. Cander's denial of the causal link between silica and lung cancer focuses on the existence of confounding factors, such as cigarette smoking, but Dr. Britton correctly points out that Dr. Cander does not consider the studies that show a synergistic effect between smoking and silica exposure on the development of lung cancer. In light of these studies, cigarette smoking is not a confounding factor, but instead is considered an additive factor in the development of lung cancer. Because Dr. Britton's opinion is supported by the bulk of the medical evidence and Dr. Cander's opinion fails to account for numerous contrary studies, this tribunal finds Dr. Britton's opinion more persuasive.

Claimant has also demonstrated that Cole was exposed to coal dust containing silica. ISGS demonstrates the inseam quartz (silica) content of the coal where Cole worked at up to 5.5%. The significance of this percentage of silica exposure is not placed into context—there is no suggestion that the silica levels are comparatively high or that they meet the levels of exposure documented in the medical literature to cause lung cancer.

#### *Medical Evidence Purporting to Link Cole's Cancer to Coal Dust Exposure*

Demonstrating a link between silica exposure and lung cancer is not the equivalent of proving that Cole's exposure to silica caused his lung cancer. *See Knizer v. Bethlehem Mine Corporation*, 8 B.L.R. 1-5, 1-7 (1985) (finding that generalized testimony not specifically focused on the miner is insufficient to support a conclusion about etiology). In other words, Claimant has demonstrated that silica exposure, especially silica exposure in conjunction with cigarette smoking, can cause lung cancer, but has not demonstrated that Cole's lung cancer was caused, at least in part, by coal dust exposure. This last inferential step is difficult to prove but is a necessary predicate to receive benefits.

Claimant relies on a medical report by Dr. Britton to support a finding that Cole's lung cancer was, at least in part, caused by coal dust containing silica. Dr. Britton's opinion, however, is insufficient on several fronts. First, and perhaps most critically, Dr. Britton does not support his conclusion with any objective evidence, such as an autopsy or biopsy, that shows that Cole's lung cancer was consistent with cancer caused by silica exposure as opposed to cancer from another cause, such as Cole's cigarette smoking or subsequent employment. Cole has a long smoking history of at least forty pack years and a relatively short period of coal mining employment of only four-and-a-half years. Cole also subsequently worked in a foundry for

fifteen years where he was exposed to additional coal dust and even coal dust containing silica. Both Drs. Long and Cander opined that Claimant's smoking history was, in and of itself, sufficient for Cole to develop lung cancer. Dr. Britton's opinion does not show that Cole's short coal mining employment contributed to Cole's development of lung cancer, especially in light of Cole's substantial exposure to other potential carcinogens.

This tribunal cannot conclude that Cole's coal mine employment was absolutely not a factor in his development of lung cancer, but given the existence of more probable causes and the lack of medical evidence linking Cole's cancer to coal dust exposure, this tribunal concludes that Claimant has failed to carry the burden of establishing by a preponderance of the evidence that Cole's death was due to pneumoconiosis or that pneumoconiosis was a substantial contributing cause of his death.

#### Attorney's Fees

Attorney's fees are awarded under the Act only when the claimant is found to be entitled to benefits. Because benefits were not awarded in this case, the Act prohibits the charging of any fee for services rendered to the Claimant in pursuit of this claim.

### **ORDER**

Enos M. Cole's request for modification and claim for benefits under the Act are denied.

**A**

EDWARD TERHUNE MILLER  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 (thirty) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20001.